# STATE OF MINNESOTA OFFICE OF ADMINSTRATIVE HEARINGS FOR THE DEPARTMENT OF LABOR AND INDUSTRY

M. Scott Brener, Commissioner, Department of Labor and Industry, State of Minnesota,

Complainant,

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Kraus-Anderson Construction Company,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on October 18, 2005, at the Office of Administrative Hearings in Minneapolis, Minnesota. The OAH record closed on October 21, 2005, upon receipt of notification from the Respondent that it would not seek to reconvene the hearing for further testimony regarding Exhibit 9.

Rory H. Foley, Assistant Attorney General, 443 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Commissioner of the Department of Labor and Industry (Complainant). James E. Schmeckpeper, Associate General Counsel, 523 South Eighth Street, Minneapolis, MN 55404, appeared on behalf of Kraus-Anderson Construction Company (Respondent).

#### NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order constitutes the final decision of the Commissioner. Under Minn. Stat. §§ 182.661, subd. 3, and 182.664, subd. 5, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. Rule Ch. 5215.

## STATEMENT OF ISSUES

This case presents the following issues:

1. Whether the citations issued by the Department's Occupational Safety and Health Division to the Respondent on or about August 9, 2004, involving failure to

provide proper fire extinguishers in violation of 29 C.F.R. § 1926.150(c)(1)(i) and 29 C.F.R. § 1926.150(c)(1)(iv), and failure to provide required stairway handrails in violation of 29 C.F.R. § 1926.1052(c)(1), were proper;

- 2. Whether those violations were properly classified as serious;
- 3. Whether the abatement dates and penalties of the citations were appropriate; and
- 4. Whether the Respondent, a general contractor on the project, was properly cited for those violations.

The Administrative Law Judge concludes that the Respondent did violate 29 C.F.R. § 1926.150(c)(1)(i) and (iv), and 29 C.F.R. § 1926.1052(c)(1), that the violations were properly considered to be serious, that the abatement dates and penalties assigned to the citations were appropriate, and that the Respondent, as general contractor, was properly cited for the violations.

Based on the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

- 1. In March 2004, construction began on a senior residential apartment complex, Woodbridge Senior Cooperative, at 8601 Bass Lake Road, New Hope, Minnesota (the worksite). The Respondent was the general contractor on the project and hired several subcontractors to assist with completion of the project. The completed project was approximately 130,000 square feet.<sup>1</sup>
- 2. Ryan Nosan is a principal safety investigator for the Minnesota Office of Safety and Health (MnOSHA).<sup>2</sup> On July 29, 2004, Mr. Nosan, then a senior safety investigator for MnOSHA, conducted an inspection of the worksite. The inspection was not triggered by any reported injuries, accidents, or complaints, but was randomly initiated as an "activity-generated inspection" on a project larger than 10,000 square feet in size.<sup>3</sup>
- 3. Mr. Nosan conducted an opening conference with the Respondent's project superintendent, Brian Ovre, in the Kraus-Anderson job trailer. Mr. Ovre was the only on-site employee of Respondent on the day of the inspection. During the conference, Mr. Nosan explained the nature, purpose, and scope of the investigation. Mr. Nosan thereafter conducted a walk-around inspection of the worksite.<sup>4</sup>

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<sup>&</sup>lt;sup>1</sup> Exs. 1, 2; Testimony of Ryan Nosan, Brian Ovre.

<sup>&</sup>lt;sup>2</sup> MnOSHA is a division of the Minnesota Department of Labor and Industry. OSHA is the acronym for the federal Occupational Safety and Health Act.

<sup>&</sup>lt;sup>3</sup> Ex. 2; Testimony of Ryan Nosan.

<sup>†</sup> Id.

- 4. Three subcontractors were on the worksite at the time of the inspection. Approximately 15 employees of J. Eiden Construction, the framing contractor, were completing interior and exterior wall framing on the second floor. Approximately four employees of Doody Mechanical were in the process of hanging water piping throughout the underground parking garage. An unspecified number of Collins Electric employees were in the process of servicing temporary wiring and wiring permanent boxes in the garage.<sup>5</sup>
- 5. At the time of the inspection, the basement of the building an underground parking garage was finished with precast walls and a concrete floor. The first floor was fully framed in with stick (wood) framing but did not yet have doors or windows installed. The deck of the second floor (ceiling of the first floor) was completed, and the walls on the second floor were being framed on the day of the inspection. Approximately 40-50% of the second floor framing was complete.<sup>6</sup>
- 6. Three sets of stairways were on-site: the center and south stairways ran from the basement level to the second floor, and the north stairway ran from the first floor landing to the second floor. An extension ladder was utilized to reach the basement from the first floor on the north end of the building. Only the center stairway and the south stairway from the basement to the first floor were equipped with handrails on the day of the inspection. The open north and south stairways had no handrails from the first floor to the second floor and were not blocked off. These stairways each had more than four risers (stairs). In addition, there were no fire extinguishers within the building.
- 7. During the inspection, Mr. Nosan noted that the housekeeping on the project was "not great," since cardboard, wood, and other flammable scrap material was left lying around the worksite. The inspection was conducted on a Thursday, and general clean-up at the worksite was typically performed on Fridays. 2
- 8. Propane torches were being used in the garage area on the day of inspection, but not on the first or second levels of the worksite.<sup>13</sup>
- 9. During the closing conference, Mr. Nosan discussed the proposed citations for missing handrails and fire extinguishers with Mr. Ovre, and abatement

<sup>&</sup>lt;sup>5</sup> Ex. 2 at 3; Testimony of Ovre.

<sup>&</sup>lt;sup>6</sup> Testimony of Ovre, Nosan.

<sup>&</sup>lt;sup>7</sup> Testimony of Ovre.

<sup>&</sup>lt;sup>8</sup> Ex. 10; Testimony of Ovre, Nosan.

<sup>&</sup>lt;sup>9</sup> Ex. 10 at 2, 3, 5.

<sup>&</sup>lt;sup>10</sup> Exs. 4, 10; Testimony of Nosan, Ovre. The Respondent did not dispute the assertion by the inspector in his testimony and inspection narrative (Ex. 4) that the stairways without handrails generally had 12 to 15 risers.

<sup>&</sup>lt;sup>11</sup> Testimony of Nosan; Ex. 3.

<sup>&</sup>lt;sup>12</sup> Testimony of Ovre.

<sup>&</sup>lt;sup>13</sup> Testimony of Ovre.

periods were agreed upon. Mr. Ovre stated that he would have fire extinguishers on site by the end of the day and that handrails would be installed in all stairways immediately.<sup>14</sup> Mr. Nosan also issued citations to subcontractor Eiden Construction for handrail and fall protection violations pertaining to workers on the second floor of the project.<sup>15</sup>

- 10. Mr. Nosan prepared a penalty worksheet for the three Kraus-Anderson violations. In calculating penalties, both a severity rating and a probability rating are assigned. The MnOSHA Field Compliance Manual identifies severity ratings ranging from "A" (nonserious) to "F" (serious), depending on the severity of injury or illness that could reasonably be expected to result from an employee's exposure to the violative condition. Ratings of "C" through "F" are considered to be "serious" violations, while ratings of "A" and "B" are considered to be "non-serious" violations. The probability ratings in the Manual range from "1" to "8," and are based on the combined factors of employee exposure, proximity to the hazard, duration of the hazard, and work conditions. A rating for additional instances may also be assigned. Penalties are determined from a penalty chart which assigns penalty amounts based on the combined severity and probability ratings. These unadjusted penalties may then be reduced by credits assigned for good faith of the employer, size of the business, and history of previous violations.
- 11. In determining the penalty for failure to provide fire extinguishers, Mr. Nosan assigned a severity rating of "C" for the grouped violations, based on the potential for limited first degree burns which could occur should a fire break out with no fire extinguishers on site. 22 Mr. Nosan noted that a "C" rating is the lowest severity rating allowable on the burn scale provided in the MnOSHA Field Compliance Manual. A probability rating of "10" was assigned based on the cumulative ratings of the four probability categories and the additional instances category: 11-20 employees exposed to the hazard ("3"), close proximity to hazard ("1"), duration of hazard greater than 50% of normal workday ("2"), work conditions including numerous combustible items in the building ("2"), and additional instances of multiple missing fire extinguishers ("2"). The initial combined severity/probability rating assigned for fire extinguisher violations was "C10." As the maximum probability rating allowable is an "8" for penalty calculations, however, Mr. Nosan reduced the combined rating to "C8."

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<sup>&</sup>lt;sup>14</sup> Ex. 2, p. 3.

<sup>&</sup>lt;sup>15</sup> *Id.*; Testimony of Nosan.

<sup>&</sup>lt;sup>16</sup> Ex. 3 and Ex. 4.

<sup>&</sup>lt;sup>17</sup> Ex. 9 at VI-1 through VI-3; Testimony of Nosan.

<sup>&</sup>lt;sup>18</sup> Ex. 9 at VI-3 through VI-6; Testimony of Nosan.

<sup>&</sup>lt;sup>19</sup> Ex. 9 at VI-6 through VI-7; Testimony of Nosan.

<sup>&</sup>lt;sup>20</sup> Ex. 9 at VI-24; Testimony of Nosan.

<sup>&</sup>lt;sup>21</sup> Ex. 9 at VI-7 through VI-10; Testimony of Nosan.

<sup>&</sup>lt;sup>22</sup> Ex. 9, Appendix VI-C.

<sup>&</sup>lt;sup>23</sup> Ex. 3.

- 12. The unadjusted penalty associated with "C8" violations is \$2,000.00.<sup>24</sup> In calculating adjustments to the penalty, Respondent was allotted no credit for employer size due to its employment of over 250 workers. Mr. Nosan applied the maximum 40% credit for employer good faith and history, resulting in a final penalty for fire extinguisher violations of \$1,200.00.<sup>25</sup>
- 13. In determining the penalty for the handrail violations, Mr. Nosan assigned a severity rating of "C" due to fall exposure of 6-10 feet, in accordance with the MnOSHA Citation Rating Guide contained in the Field Compliance Manual. <sup>26</sup> Mr. Nosan assigned a probability rating of "7," based on the cumulative ratings of the four probability categories and the additional instances category: 2-10 employees exposed to the hazard through use of stairways to access upper working level ("2"), workers within danger zone ("2"), duration of hazard 10-50% of normal workday ("1"), no adverse work conditions ("0"), and multiple instances of missing handrails in stairways throughout the building ("2"). <sup>27</sup>
- 14. The overall severity/probability rating of "C7" for handrail violations produced an unadjusted penalty of \$2,000.00, which was reduced through credits for good faith and employer history to an adjusted penalty of \$1,200.00.<sup>28</sup>
- 15. On August 9, 2005, the Commissioner of Labor and Industry issued a Citation and Notification of Penalty identifying both the fire extinguisher and handrail violations as "serious" and imposing a penalty of \$1,200.00 for the two grouped fire extinguisher violations and a penalty of \$1,200.00 for the handrail violations. The total of the penalties was \$2,400.00.<sup>29</sup> Respondent filed a timely notice of contest of the violations and the associated penalties.<sup>30</sup>
- 16. On October 28, 2004, the Commissioner issued a Complaint seeking an order affirming the violation and penalty identified in the Citation and Notification of Penalty issued to the Respondent. On November 10, 2004, Respondent filed an Answer to the Complaint.
- 17. On March 25, 2005, the Commissioner issued a Notice and Order for Hearing setting this matter for a contested case hearing. A continuance of the original hearing date of May 16, 2005, was ordered to allow for an informal mediation conference between the parties.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

<sup>26</sup> Ex. 9, Appendix VI-A. Mr. Nosan also considered the general industry standard, 1910.24(h), which rates this hazard a "C+" when there are more than nine risers.

<sup>&</sup>lt;sup>24</sup> Ex. 9, Table VI-2 Penalty Chart, at VI-24.

<sup>&</sup>lt;sup>25</sup> Fx 3

<sup>&</sup>lt;sup>27</sup> Exs. 4, 9 at VI-24; Testimony of Nosan.

<sup>&</sup>lt;sup>28</sup> Id.

<sup>&</sup>lt;sup>29</sup> Ex. 5; Testimony of Nosan.

<sup>&</sup>lt;sup>30</sup> Complaint; Testimony of Nosan.

#### CONCLUSIONS

- 1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 182.661, subd. 3, and 182.664.
- 2. The Department gave proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law or rule.
- 3. The Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.
- 4. Minn. Stat. § 182.653, subd. 3, requires each employer to comply with occupational safety and health (OSH) standards or rules adopted pursuant to Minnesota Statutes Chapter 182.
- 5. Minn. R. 5205.0010, subp. 6, incorporates by reference the provisions of 29 C.F.R. § 1926.
- 6. 29 C.F.R. § 1926.150(c)(1)(i) requires that "[a] fire extinguisher, rated not less than 2A, shall be provided for each 3,000 square feet of the protected building area, or a major fraction thereof. Travel distance from any point of the protected area to the nearest fire extinguisher shall not exceed 100 feet." 29 C.F.R. § 1926.150(c)(1)(iv) states that "[o]ne or more fire extinguishers, rated not less than 2A, shall be provided on each floor. In multistory buildings, at least one fire extinguisher shall be located adjacent to stairway."
- 7. 29 C.F.R. § 1926.1052(c)(1) specifies that "[s]tairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with (i) [a]t least one handrail; and (ii) [o]ne stairrail system along each unprotected side or edge."
- 8. The Complainant has the burden of establishing an OSH violation by a preponderance of the evidence.
- 9. A "serious violation" is defined in Minn. Stat. § 182.651, subd. 12, to mean "a violation of any standard, rule, or order other than a de minimis violation which is the proximate cause of the death of an employee" or "a violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."
- 10. The Complainant has established by the preponderance of the evidence that there were no fire extinguishers in the building under construction, that two worksite

stairways having four or more risers had no railings, and that employees on the worksite were exposed to the cited hazards, and has thereby shown that the Respondent violated the standards of 29 C.F.R. § 1926.150(c)(1)(i), 29 C.F.R. § 1926.150(1)(iv), and 29 C.F.R. § 1926.1052(c)(1).

- 11. The Respondent knew or, with the exercise of reasonable diligence, should have known of the presence of the violations.
- 12. The Respondent's violations of 29 C.F.R. 1926.150(c)(1)(i) and (iv) are correctly classified as severity level "C," and are appropriately treated as serious violations within the meaning of Minn. Stat. 182.651, subd. 12.
- 13. The Respondent's violation of 29 C.F.R. 1926.1052(c)(1) is correctly classified as severity level "C," and is appropriately treated as a serious violation within the meaning of Minn. Stat. § 182.651, subd. 12.
- 14. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.
- 15. The original penalty amounts and adjustments thereto were appropriately calculated for the violations pursuant to the MnOSHA Field Compliance Guide and Minn. Stat. § 182.666, resulting in a penalty of \$1,200.00 for Citation No. 1, Items 1(a) and 1(b), and a penalty of \$1,200.00 for Citation No. 1, Item 2.
- 16. The foregoing Conclusions of Law are based on the reasons set out in the Memorandum that follows. The Memorandum is incorporated into these Conclusions by reference.

Based upon the foregoing Conclusions of Law, the Administrative Judge makes the following:

## **ORDER**

## IT IS HEREBY ORDERED that:

- 1. Citation No. 1, Items 1(a) and 1(b), failure to provide fire extinguishers as required by 29 C.F.R. § 1926.150(c)(1)(i) and (iv), is AFFIRMED.
- 2. Citation No. 1, Item 2, failure to provide handrails as required by 29 C.F.R. § 1926.1052(c)(1), is AFFIRMED.
- 2. The Respondent shall forthwith pay to the Commissioner of Labor and Industry the sum of \$2,400.00.

3. If the penalty is not paid within 60 days after the fine becomes a final order, it must be increased to 125 percent of the original assessed amount. After 60 days, unpaid fines shall accrue an additional penalty of 10 percent per month compounded monthly until the fine is paid in full, as required by Minn. Stat. § 182.666, subd. 7.

Dated this 18th day of November, 2005.

s/Barbara L. Neilson

BARBARA L. NEILSON Administrative Law Judge

Reported: Tape recorded (two tapes); not transcribed.

# **MEMORANDUM**

The Respondent admits to the specified violations but presents a number of arguments regarding the gravity of the violations and the resulting penalties.

# Fire Extinguishers

As to the violation of fire extinguisher standards, the Respondent presents four arguments. First, the Respondent's project superintendent maintains that there was a fire extinguisher in the Kraus-Anderson job trailer on the day of the inspection. Even if such a fire extinguisher were present, however, and even if that fact had been communicated to the safety inspector, the OSH standard would not have been met. The requirement of 29 C.F.R. § 150(c)(1)(i) that one fire extinguisher be provided for each 3,000 square feet of the "protected building area" and the requirements of 29 C.F.R. § 1926.150(c)(1)(iv) that at least one fire extinguisher be provided "on each floor" and "adjacent to stairways" clearly refer to locations within the building under construction.<sup>31</sup> Further, there is no evidence that any employee working at the worksite knew of the fire extinguisher in the trailer or would have known where to go in the event of an emergency to procure a fire extinguisher.<sup>32</sup> Moreover, because the standard specifies that "[t]ravel distance from any point of the protected area to the nearest fire extinguisher shall not exceed 100 feet,"<sup>33</sup> the purpose of the standard obviously is to ensure that fire extinguishers are within easy reach by those working in the building under construction.

Second, the Respondent maintains that a decision was made by its project superintendent and its safety coordinator to avoid possible vandalism or theft of portable

<sup>33</sup> 29 C.F.R. 1926.150(c)(1)(i).

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 $<sup>^{31}</sup>$  Franklin R. Lacy (Aqua View Apartments), 9 BNA OSHC 1253, 1981 CCH OSHD ¶ 25,171 (No. 3701, 1981).

<sup>&</sup>lt;sup>32</sup> R. B. Thomas Electric, Inc., 19 BNA OSCH 1785, 2001 OSHD ¶ 32,486 (No. 00-2333, 2001).

fire extinguishers by deferring installation of the fire extinguishers until after a security fence had been constructed around the worksite. Because the goal of the OSH regulations is not to protect fire extinguishers, but to protect the safety of the employees at the worksite, this argument does not excuse the violation. The more prudent approach would have been to construct the security fence at an earlier point in the construction or take other steps to secure the project and/or the extinguishers.

Third, the Respondent argues that the OSH fire extinguisher standards do not apply to a building in the early stages of construction. Respondent asks for guidance regarding a timeline for introduction of fire extinguishers into a project. The project in question had a finished basement, a fully-framed first floor, and a partially-framed second floor on the day of inspection. The first paragraph of 29 C.F.R. § 1926.150 makes it clear that employers "shall be responsible for the development of a fire protection program to be followed throughout all phases of the construction and demotion work . . . . "35 The OSH safety regulations apply as soon as construction The exact number of fire extinguishers that are required at any point in construction depends upon the completed square footage of the project, the number of floors in the building, and the number of stairways in the building. The requirement that one fire extinguisher be provided adjacent to each stairway dictates that the number of fire extinguishers required will increase with the number of stairways constructed.<sup>36</sup> Likewise, the requirement that one fire extinguisher be provided per floor dictates that additional fire extinguishers will be required as additional floors are constructed. 37 The rules do not support the Respondent's argument that the provision of necessary fire protection equipment may be delayed

For larger buildings, the most significant requirement is that, regardless of the number of floors or stairways, a fire extinguisher, rated not less than 2A, shall be provided for each 3,000 square feet of the protected building area, or major fraction thereof. The Department interprets the phrase "protected building area" to mean any location where work on the project is taking place. To satisfy this standard, the general contractor must provide a fire extinguisher as soon as a "major fraction" of the first 3,000 square feet of the project has been completed, with an additional fire extinguisher installed for each additional 3,000 square feet of the project, or major fraction thereof. In this case, Mr. Ovre's testimony suggested that the Respondent had completed approximately 27,000 square feet of construction per floor on the lower level and the first floor, and approximately 13,000 square feet of the second floor (40-50%), for a total of approximately 67,000 square feet. Workers were engaged in activity on each of the three floors. Therefore, it appears that approximately 22 fire extinguishers were required to meet the regulatory standard on the day of inspection.

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<sup>&</sup>lt;sup>34</sup> The more likely explanation may be that the Respondent's project superintendent simply forgot about the fire extinguishers, as reported by the safety inspector in his narrative and testimony.

<sup>&</sup>lt;sup>35</sup> 29 C.F.R. § 1926(a)(1) (emphasis added).

<sup>&</sup>lt;sup>36</sup> 29 C.F.R. § 1926.150(c)(1)(iv).

<sup>&</sup>lt;sup>37</sup> Id.

<sup>&</sup>lt;sup>38</sup> 29 C.F.R. § 1926.150(c)(1)(i)

Testimony of Ryan Nosan. The Respondent did not provide any authority supporting a different interpretation, and the Administrative Law Judge has been unable to find any.

Fourth, the Respondent contends that the existence of a fire hazard and the availability of means of escape should be taken into consideration when assessing a penalty for OSH violations. The OSH regulations, however, clearly indicate that standards for providing fire extinguishers at the worksite are mandatory and are not predicated on the existence of a fire hazard. Fire extinguishers are required to be provided according to the regulations, whether or not an obvious fire hazard exists.<sup>40</sup> It is to be noted, however, that fire hazards did exist at the worksite: most notably, the stick frame building, itself, the glue used in construction, and the numerous combustible materials which the safety inspector observed lying around the workplace. The safety inspector did not issue a separate citation for poor housekeeping, but considered the additional combustible materials when assessing the "work conditions" component of the probability rating for the fire extinguisher violations. The Respondent notes that workers could escape the building in the event of a fire through open first floor doors and windows. This first floor escape routes, however, might not be available to workers on the second floor or in the basement in the event of stairway fires. Second floor workers might be limited to a choice of jumping from the unfinished second level or attempting to fleet via open stairways with no handrails, thus creating the potential for fall injuries in addition to burn injuries. In either event, workers confronted by a fire would risk serious physical harm or even death.

Further, the severity of a violation is measured not by the likelihood of an accident, such as a fire, but by the potential for death or serious physical harm which would probably result if the potential accident should occur. 41 The purpose of fire extinguishers is to reduce the probability of serious injury in the event of a fire. When fire extinguishers are not provided, the likelihood of serious physical harm caused by a fire escalates. The MnOSHA Field Compliance Manual is very explicit when assigning severity ratings for conditions which create the potential for burns. Although the MnOSHA Citation Rating Guide does not provide a severity rating specifically for violations of 29 C.F.R. §§ 1926.150(c)(1)(i) or (iv), the Manual does provide a special appendix for determination of severity levels by type of potential injury. Under the category of "Burns," the Guide provides only for ratings of "C" to "F," all of which are rated "serious." 42 In this case, the safety inspector assigned a "C" rating to the violations due to the potential for limited first degree burns which could result if a fire should break out in the building. The safety inspector also assigned a probability rating of "10," a rating literally off the chart, for this group of violations. The safety inspector's ratings for severity and probability were guided by the criteria set forth in the Field Compliance Manual utilized by MnOSHA charts and were consistent with those criteria. Because the inspector followed all MnOSHA protocols in assigning the ratings and the associated penalty, the ratings and penalty are reasonable and have been shown to be appropriate.

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Ex. 9, Appendix VI-C.

<sup>&</sup>lt;sup>40</sup> Cornell & Co., Inc., 5 BNA OSHC 1736, 1977-78 CCH OSHD ¶ 22,095 (No. 8721, 1978).

<sup>&</sup>lt;sup>41</sup> Latite Roofing & Sheet Metal Co., Inc., OSCH, 2002 CCH OSHD ¶ 32,661 (No. 02-0656, 2002) (citing Spancrete Northeast, Inc., 15 BNA OSHC 1020, 1024 (No. 86-521, 1991); OSH Act of 1970, Public Law 91-596, 84 Stat. 1590, sec. 18, subd. (k) (1970).

#### Handrails

As to the violation of handrail standards, the Respondent presents two arguments. First, the Respondent argues that the classification of the violation and the resulting penalty should be reduced because only one of Respondent's employees was at the worksite on the day of the inspection, and it was merely the general contractor on the project. It is well-established that the duty of a general contractor is not limited to the protection of its own employees from safety hazards, but extends to the protection of all the employees engaged at a worksite. The Respondent was responsible for the safety of all on-site employees working on the common undertaking on the day of inspection. The safety inspector assigned proper probability ratings according to the number of on-site workers exposed to the fall hazard through use of stairways to access the second floor working level, the number of workers within the danger zone, and the duration of employee exposure to the hazard.

The Respondent further argues that the handrail penalty should be reduced because only two stairways lacked handrails.<sup>44</sup> The gravity of a violation is the combined assessment of the severity and probability of the injury which would most likely occur as a result of the alleged violation. Specific guidelines for rating the severity of the most frequently cited standards are contained in the MnOSHA Citation Rating Guide (CRG).45 These guidelines are to be followed by OSH safety inspectors unless they can justify a departure from the guidelines. 46 The CRG explicitly requires a severity rating of "C" for 29 C.F.R. § 1052(c)(1) violations where fall exposure of 6-10 feet exists. When multiple instances of the same violation exist, such additional violations are used in calculating the probability rating. One additional probability point is to be added for each additional instance of the same violation.<sup>47</sup> In this case, the safety inspector should have added only one probability point for the second stairway missing handrails. The gravity of the handrail violations is therefore reduced from "C7" to C6." The reduction of the rating has no impact on the amount of the penalty assessed, however. 48 The violation was appropriately considered to be serious, and the assigned penalty, as dictated by the MnOSHA Penalty Chart, Table VI-2, is reasonable and appropriate.

In requesting penalty reductions, the Respondent also noted, in general, its good faith in meeting regularly with regulators and in attempting to comply with all regulations. The inspector did take the good faith and regulatory history of the company into

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<sup>&</sup>lt;sup>43</sup> Marshall v Knutson Construction Co., 566 F.2d 596 (8th Cir. 1977); Grossman Steel & Aluminum Corp., 4 BNA OSCH 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976), Anning-Johnson Co., 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (Nos. 3694 & 4409, 1976); Brennan v Underhill Construction Corp., 513 F.2d 1032, 1038 (2nd Cir. 1975).

<sup>&</sup>lt;sup>44</sup> The safety inspector cited "multiple" stairways without handrails.

<sup>&</sup>lt;sup>45</sup> Ex. 9, Appendix VI-A.

<sup>&</sup>lt;sup>46</sup> Ex. 9 at VI-1.

<sup>&</sup>lt;sup>47</sup> Ex. 9 at VI-7.

<sup>&</sup>lt;sup>48</sup> See Ex. 9, Penalty Chart VI-2 at VI-24. The unadjusted penalty for violations rated C5 through C8 is considered to be \$2,000.

consideration when applying the maximum 40% credit toward reduction of the unadjusted penalties assessed.

Accordingly, the Administrative Law Judge has ordered that the citations and penalties be affirmed.

B.L.N.